

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1037 of 1996

Hon'ble MR.JUSTICE Y.B.BHATT:

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1. Whether Reporters of Local Papers may be allowed to see the judgments?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

VIJAYKUMAR RATILAL GANDHI & OTHERS

Versus

RASIKLAL TRIBHOVANDAS

Appearance:

MR NK MAJMUDAR for Petitioners

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision:17/12/99

ORAL JUDGMENT

#. This is a revision under section 115 CPC at the instance of the original defendants in the suit.

#. A suit was filed by the present respondent (as plaintiff no.1) and his brother as plaintiff no.2 against the defendants on the ground that the defendants were tenants of the plaintiff, and sought for a decree of eviction and possession from the defendants on various grounds under the provisions of the Bombay Rent Act. The

Rent Court dismissed the suit on merits. The plaintiffs therefore preferred an appeal under the provisions of the Bombay Rent Act. While the appeal was pending, appellant no.2 namely original plaintiff no.2 died, and apparently the heirs were not brought on record. The respondents in appeal (original defendants) therefore gave an application at exh. 16 in the appeal pointing out that appellant no.2 - Muljibhai has expired and that no application to bring the heirs on record has been filed within the period of limitation, and that therefore, the appeal would abate as a whole. The court after hearing the parties, rejected the application, substantially on the finding that the appeal would not abate as a whole, inasmuch as right to pursue the appeal survives in favour of appellant no.1.

#. It is this order of the lower appellate court which is the subject matter of the present revision. Having heard the learned counsel for the petitioners at length, I find that the impugned judgment and order is perfectly justified on facts and in view of the well settled legal principles.

#. It is abundantly clear from the provisions of Order 22 Rule 1 & Rule 3, that the court shall proceed with the suit where one of the two plaintiffs dies, and the right to sue survives in favour of the surviving plaintiff or plaintiffs. The other principle laid down by Rule 3 is equally clear to the effect that where no application to bring the heir of the deceased plaintiff is preferred within time limited by law, the suit shall abate so far as the deceased plaintiff is concerned. Thus, the legal position is abundantly clear to the effect that if one of the co-appellants dies, if it is found that the surviving co-appellant has a right to continue the proceeding, that proceeding cannot abate as a whole. Looking to the facts and circumstances of the present case, it is found from the plaint and particularly from the recitals in para 1 in the suit filed jointly by plaintiff nos. 1 & 2, wherein it has been firstly averred that the property is of joint ownership of the two plaintiffs. It is then clarified that so far as the revenue records are concerned, the suit property stands in the name of plaintiff no.1 and also stands in the name of plaintiff no.2 in other records. So far as the defendants' written statement at exh. 13 is concerned, there is no denial to the joint title averred by the plaintiffs in respect of the suit property. The only denial in a vague and round about manner is by way of a suggestion on the part of the defendants that the property was originally an HUF property of the father of the plaintiffs, and if at all

there was a partition of such property, the defendants are not aware of the same. Thus, from these pleadings and the averments made on record, it cannot be said that the defendants have even remotely challenged the joint title of the two plaintiffs. Obviously therefore, if one of the two joint owners dies during the pendency of the proceedings, it cannot possibly be suggested that the right to sue or continue the proceeding does not survive in favour of the surviving joint owner. In this context, learned counsel for the petitioner sought to rely upon a decision of the Supreme Court in the case of Sri Chand & others v. M/s. Jagdish Pershad Kishan Chand & ors. reported in AIR 1966 SC 1427. In this decision, the Supreme Court after referring to an earlier decision of the Supreme Court, reported in AIR 1963 SC P. 1901, held that the principle laid down in para 4 of the said decision is only to the effect that the appellate court has no power to proceed with an appeal and to reverse or vary a decree in favour of all the plaintiffs or defendants or defendants under Order 41 Rule 4 when the decree proceeds on a ground common to all the plaintiffs and defendants, if all the plaintiffs or defendants, appeal from the decree, and any one of them dies, the appeal abates so far as he is concerned. (Emphasis supplied). What is required to be noted is that where there is a decree in favour of a party, and the other side is in appeal, obviously the decree is a joint decree in favour of those parties, and in the absence of one of such parties, joint decree could not be set aside for all time by the appellate court since such joint decree proceeds on a common ground in respect of the judgment creditors. On the facts of the case, I find that the trial court had dismissed the suit of the two plaintiffs which plaintiffs were in appeal, they were therefore not judgment creditors, but were appellants against the dismissal of the suit. Obviously although the suit had been filed by the two plaintiffs, as joint owners of the property, it was clearly open to one of those joint owners to prefer an appeal from the dismissal of the suit, even if the other joint plaintiff did not join any as appellant in the appeal. It cannot possibly be suggested or urged that if a suit filed jointly by two plaintiffs is dismissed and the appeal could not be filed by one of them.

#. Even otherwise as discussed hereinabove on the facts of the case, it is found that the respondent as plaintiff no.1, is joint owner of the property which is the subject matter of the suit, and he is a person in whose favour, the right to sue survives. Thus, death of plaintiff no.2 (appellant no.2 in appeal) would not make the entire

appeal non maintainable, and it cannot be held that the appeal abates as a whole.

#. The impugned order passed by the lower appellate is therefore required to be upheld.

#. This revision is therefore dismissed. Rule is discharged with no order as to costs. Interim relief stands vacated.

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